Eastern District of Kentucky
FILED

DEC 29 2003

AT FRANKFORT
LESLIE G WHITMER
CLERK U S DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL ACTION NO. 03-23-JMH

BELLSOUTH TELECOMMUNICATIONS, INC., PLAINTIFF,

v.

MEMORANDUM OPINION AND ORDER

CINERGY COMMUNICATIONS COMPANY, et al., DEFENDANTS.

****

In this action, BellSouth Telecommunications, Inc. ("BellSouth") seeks review of a Kentucky Public Service Commission ("PSC" or "Commission") decision. The decision at issue was the result of an arbitration conducted by the Commission pursuant to Sections 251 and 252 of the Telecommunications Act of 1996, 47 U.S.C. §§251-252 (the "1996 Act"). The crux of the decision to which BellSouth objects states that:

> BellSouth may not refuse to provide Digital Subscriber Line ("DSL") service pursuant to a request from an Internet service provider who serves, or who wishes to serve, a customer who has chosen to receive voice service from a Competitive Local Exchange Carrier ("CLEC") that provides service over the Unbundled Network Elements Platform ("UNE-P").

Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc.

EXHIBIT
A

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Pursuant to 47 U.S.C. Section 252; Case 2001-00432, October 15, 2002 Order. BellSouth asserts that the Commission's decision purports to regulate interstate telecommunications services in a manner that is directly contrary to binding Federal Communications Commission ("FCC") rulings and to BellSouth's federal tariff. BellSouth also claims that the Commission should never have decided the issue presented in this case because it was not set forth in Cinergy's arbitration petition as required by the 1996 Act. Additionally, BellSouth argues that the PSC's decision was arbitrary and unsupported by the record.

I. BACKGROUND

A. Procedural Background

Cinergy is a privately-owned, Kentucky corporation which has been operating in Kentucky as a telecommunications provider since 1977. To facilitate its service to Kentucky residents, Cinergy entered into an initial interconnection agreement with BellSouth which expired on November 29, 2001. On May 30, 2001, Cinergy commenced negotiations with BellSouth for a new interconnection agreement pursuant to Section 251 of the 1996 Act. Despite a number of negotiation sessions over the next several months, the parties were unable to reach agreement on a number of issues. As a result, on December 10, 2001, Cinergy filed a Petition for Arbitration pursuant to Section 252 of the 1996 Act, requesting the PSC resolve sixteen disputed issues.

BellSouth filed its formal Response to the Petition on January 3, 2002, admitting the Commission had jurisdiction over the issues raised by Cinergy. The Commission set a procedural schedule for resolution of the case. Pursuant to the schedule, the parties filed agreed-upon portions of the interconnection agreement, as well as "Best and Final Offers" on the disputed issues. On January 31, 2002, the Commission Staff sponsored an informal conference at which the remaining issues were discussed and debated, including the precise issue BellSouth claims was not properly part of the proceeding. Limited discovery occurred, followed by the filing of direct, and some rebuttal testimony by the parties.

As a result of continued settlement negotiations, only four issues were ultimately submitted to, and decided by, the Commission. The Commission heard the case in a formal hearing on May 22, 2002, which lasted a full day. The parties filed post-hearing briefs, proposed findings of fact and conclusions of law, and an additional brief on a specific issue requested by the Commission. The Commission issued its decision on July 12, 2002.[1]

Both parties sought clarification or rehearing of the Commission's Order. On October 15, 2002, the Commission clarified its Order, and issued a further Order on February 28, 2003,

[1] PSC Chairman Huelsmann dissented on the issue of BellSouth's refusal to provide Broadband services to a customer of a CLEC who is providing voice services via UNE-P citing regulatory uncertainty, inconsistency with FCC rulings, and lack of harm to Cinergy as the main reasons for his dissent.

necessitated by the parties' inability to agree on the language for the interconnection agreement which would effectuate the Commission's decisions. On March 20, 2003, the parties submitted the interconnection agreement to the Commission, containing language specified by the Commission, on the disputed provisions. The Commission approved the interconnection agreement on April 21, 2003.

BellSouth commenced the present appeal by filing its complaint on May 9, 2003. Timely answers and briefs were filed. BellSouth challenges only the Commission's decision that BellSouth may not refuse to provide DSL capabilities to customers for whom a CLEC, such as Cinergy, is the voice provider through means of the UNE-P.

B. The Telecommunications Act of 1996

The 1996 Act places certain obligations on incumbent local exchange carriers ("ILECs") such as BellSouth - the companies that have traditionally offered local telephone service in particular areas. These obligations are intended to assist new local telecommunications providers such as Cinergy, AT&T, and MCI; these new local competitors are often referred to as competitive local exchange carriers or "CLECs."

ILECs like BellSouth must, among other things, lease to their competitors "for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis." See 47 U.S.C. § 251(c)(3).[2] In addition to requiring access to UNEs, the 1996 Act requires ILECs such as BellSouth to offer their complete, finished retail telecommunications services provided to end users, to new entrants for resale. See 47 U.S.C. § 251(c)(4).

The 1996 Act contains a specific scheme for implementing the new obligations imposed by the federal statute. This scheme contains three parts. *First,* Congress intended the mandates of Section 251 to be implemented in the first instance through the negotiation of private, consensual agreements between ILECs and CLECs. Thus, Section 251 imposes on both ILECs and CLECs "[t]he duty to negotiate in good faith in accordance with Section 252 of this title the particular terms and conditions of agreements to fulfill" the specific duties imposed on incumbents by Section 251. *Second,* as a backstop to reliance on privately negotiated agreements, Congress enlisted the aid of state public utility commissions like the PSC. If the parties are unable to agree on all issues within 135 days after the competitor's initial request for negotiation, either party may petition the state commission to arbitrate any "open issues." 47 U.S.C. § 252(b)(1). Regardless of whether the parties reach agreement through voluntary negotiation, mediation, or arbitration, the private parties must submit their

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[2] These "network elements" are piece parts of the local telecommunications network.

agreement to the relevant state commission for approval. *See id.* § 252(e)(1). *Third,* and lastly, state commission decisions under this statute are subject to review in federal district courts for conformity with the terms of the Act. *See id.* § 252(e)(6).

C. Factual Background

Until recently, customers wishing to access the Internet relied chiefly upon "dial-up" services that relied on the voice channel of a basic telephone line to transmit and receive data at relatively low speeds. Over the last several years, however, BellSouth and other companies have invested billions of dollars to make "broadband" internet access available - that is, to provide access at much higher speeds.[3]

There are several competing technologies that provide such high-speed broadband transmission for Internet access. For instance, one of the leading technologies is cable modem service offered over cable television facilities - not telephone lines- by companies such as AOL Time Warner. BellSouth offers a competing high-speed transmission service that does use telephone lines.

[3] In an earlier case in front of the PSC, *Review of BellSouth Telecommunications, Inc.'s Price Regulation Plan,* KPSC Case 99-434. Order, Aug. 3, 2000, the Commission conducted a review of BellSouth's rates, earnings, and method of regulation. Finding that the Company had excess earnings, BellSouth faced the prospect that the Commission would require it to substantially reduce the rates of its retail ratepayers by millions of dollars. BellSouth proposed to keep the excess earnings in order to build a broadband network into rural markets in Kentucky where standard business case analysis would not support such an investment. BellSouth stated that it would "make these same capabilities available to its competitors on a wholesale basis and therefore, would not have any competitive advantage." *Cinergy Hearing Exhibit 1 (Cinergy App. 3).* The Commission accepted BellSouth's proposal.

This service is known as DSL. DSL makes use of the portion of the spectrum on a basic copper telephone line (also known as a "local loop") that is not used for voice services. DSL thus enables customers to download information from the Internet at high speeds without interfering with the normal operation of the voice channel on the telephone line.

By itself, DSL service is simply a high-speed data transmission (or transport) service. One can conceptualize DSL as the offering of a particularly large pipe for the transmission of data. In order to provide broadband Internet access on a retail basis, one must combine that DSL transmission service (the pipe) with the information routing and processing capabilities (the water running through the pipe) offered by an Internet Service Provider or "ISP" such as America Online or Earthlink.

BellSouth combines those two functions in its retail high-speed Internet access service, known as FastAccess. In addition to that retail service, BellSouth offers wholesale DSL transmission to independent ISPs so those companies can combine DSL transmission with their own capabilities in order to provide finished broadband Internet access to retail customers. The PSC's decision in this case relates only to BellSouth's wholesale offering of DSL transmission.

The PSC ruled that BellSouth may not refuse to provide DSL service pursuant to a request from an Internet service provider who serves, or wishes to serve, a customer who has chosen to receive voice service from a CLEC that provides service over the UNE-P. In other words, the PSC determined that BellSouth may not refuse to provide DSL to Cinergy, AT&T, and MCI customers; a Kentucky customer must be able to obtain DSL service regardless of the voice carrier he chooses.

II. STANDARD OF REVIEW

Along with the majority of other circuits, the Sixth Circuit has adopted and utilized a two-tiered review procedure when reviewing a ruling of a state administrative body. This bifurcated standard is employed because arriving at a decision in these types of disputes involves an understanding of the interplay between federal and state law.

The federal judiciary first reviews *de novo* whether a state public service commission's orders comply with the requirements of the Telecommunications Act. The Court also reviews the Commission's interpretation of the Act de novo, according little deference to the Commission's interpretation. *Michigan Bell Tel. Co. v. Strand* 305 F.3d 580, 586 (6th Cir. 2002). If no illegality is uncovered during such a review, the question of whether the state commission's decision is correct must then be analyzed, but under the more deferential arbitrary-and-capricious standard of review usually accorded state administrative bodies' assessments of state law principles. *See Michigan Bell Tel. Co. v. MFS Intelenet* *of Michigan, Inc.,* 339 F.3d 428, 433 (6th Cir. 2003); *Southwestern Bell Tel. Co. v. Pub. Util. Comm'n of Texas,* 208 F.3d 475, 482 (5th Cir. 2000); *GTE South, Inc. v. Morrison,* 199 F.3d 733, 745 (4th Cir. 1999); *U.S. West Communications v. MFS Intelenet, Inc.,* 193 F.3d 1112, 1117 (9th Cir. 1999).

The arbitrary and capricious standard is the most deferential standard of judicial review of agency action, upholding those outcomes supported by a reasoned explanation, based upon the evidence in the record as a whole. *See Killian v. Helthsource Provident Adm'rs, Inc.,* 152 F.3d 514, 520 (6th Cir. 1998). The Court will uphold decision "if it is the result of a deliberate principled reasoning process, and if it is supported by substantial evidence." *Id.* Thus, absent clear error in interpretation of federal law or unsupported, arbitrary and capricious findings by a state commission, the decisions of state commissions generally stand. *Michigan Bell Tel. Co. v. MCIMetro Access Trans. Svcs. Inc.,* 323 F.3d 348, 353 (6th Cir. 2003) (citing *Michigan Bell Tel. Co.,* 305 F.3d at 586-87.

III. ANALYSIS

A. Whether the PSC violated Section 252(b) of the Act

Section 252(b)(4)(a) of the 1996 Act states that a "State commission shall limit its consideration of any petition ...to the issues set forth in the petition and in the response, if any." 47 U.S.C. § 252(b)(4)(a). Cinergy filed a petition with the PSC that set forth fifteen unresolved issues arising out of interconnection negotiations with BellSouth. As stated above, due to continued negotiations, only four of these issues were ultimately addressed by the Commission.

BellSouth contends that one of the issues ultimately decided by the Commission, BellSouth's alleged obligation to continue to provide DSL service over CLEC UNE-P lines, was not raised in Cinergy's petition for arbitration. BellSouth relies on the plain language of Section 252(b)(4)(A) and states that it is improper for state commissions to resolve issues not presented in a petition for arbitration under the 1996 Act. Issues related to issues actually raised in a petition are, in BellSouth's opinion, not to be arbitrated by the PSC because of lack of notice to the parties. In any event, BellSouth contends, the issue ultimately decided by the PSC is in no way related to the issue set forth in Cinergy's original petition. Therefore, BellSouth argues that the PSC's ruling requiring BellSouth to provide DSL service on a UNE-P line was inappropriate and in violation of Section 252(b).

Cinergy takes the position that the Act does not require precise pleadings and, once an issue is open, the PSC has the discretion to review related issues. Relying on *TCG Milwaukee, Inc. v. Public Service Com'n of Wisconsin*, 980 F. Supp. 992 (W.D. Wis. 1997), Cinergy states that once the parties create an open issue, the PSC has considerable latitude to resolve the related issues necessary to finalize the interconnection agreement and make it a working document. Cinergy also contends that BellSouth had sufficient notice that this was an issue before the Commission. The issue of DSL over UNE-P was debated by the parties at the informal conference, again at the hearing, and once again in the briefs, all without objection from BellSouth.

The PSC determined in its October 15, 2003, Order that the DSL issue was "directly related" to the line-splitting issue that Cinergy raised as Issue No. 7 in its original petition, and that both parties had addressed this issue at later points in the proceeding.[4] Therefore, the PSC determined that the issue of DSL over the UNE-P was properly before the Commission. We agree and find no violation of Section 252(b).

B. Whether the PSC's Order is Preempted

BellSouth argues that PSC's Order must fail because of federal preemption, stating that, "as a matter of federal law, the Federal Communications Commission ("FCC") - not state commissions - has exclusive jurisdiction over interstate communications." Cinergy counters that this is an oversimplification that results in a

[4] The Commission also stated that determinations such as the one at issue reflect the policy of the PSC. The Commission cited Administrative Case No. 382, An Inquiry Into the Development of Deaveraged Rates for Unbundled Network Elements, Order dated December 18, 2001 at 36 which states, "The Commission also makes clear in this Order that ordinarily combined UNEs must also be made available where line-splitting occurs. Line-splitting must be made available to all CLECs on a nondiscriminatory basis. Moreover, BellSouth may not discontinue the provision of line-splitting when a CLEC provides voice service through UNE-P, regardless of which xDSL provider is used." BellSouth did not contest this Commission ruling.

flawed characterization of the current law.

BellSouth maintains that DSL service, as used to provide Internet access, is an interstate service subject to the FCC's jurisdiction. Cinergy, on the other hand, states that since 1996, responsibility for increasing competition in the realm of telecommunications services, including those with an interstate dimension, has become the responsibility of both federal and state legislatures. Cinergy points to the concept of "cooperative federalism," and states that the Sixth Circuit has described this concept as "harmoniz[ing]" the efforts of federal and state agencies. *Michigan Bell Telephone Company v. MCIMetro Access Transmission Services, Inc.*, 323 F.3d 348, 352 (6th Cir. 2003).

The Supreme Court has recognized that the Act cannot divide the world of domestic telephone service "neatly into two hemispheres," one consisting of interstate service, over which the FCC has plenary authority, and the other consisting of intrastate service, over which the states retain exclusive jurisdiction. *Louisiana Pub. Serc. Comm'n v. FCC*, 476 U.S. 355, 360 (1986); *see also Southwestern Bell Tel. Co. v. Pub. Util. Comm'n of Texas*, 208 F.3d 475, 480 (5th Cir. 2000). Rather, observed the Court, "the realities of technology and economics belie such a clean parceling of responsibility." *Id.* The FCC has also rejected the argument advanced by BellSouth, noting that "state commission authority over interconnection agreements pursuant to Section 252 extends to both interstate and intrastate matters." Reciprocal Compensation Ruling ¶25, quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order,* 11 F.C.C.R. 15499 ¶ 84, 1996 WL 452885 (1996).

In its Order, the PSC concluded that it did in fact have jurisdiction over this issue and that the FCC determinations were not preemptive:

> We also have jurisdiction over the issue of whether BellSouth acts reasonably in refusing to provide DSL service to CLEC UNE-P customers under, inter alia, 47 U.S.C. § 252(e) and K.R.S. 278.280. The FCC's determination on this issue is not, and does not purport to be, preemptive.

July 12, Order at 2.

State laws can be expressly or impliedly preempted by federal law. *Michigan Bell Tel. Co.,* 323 F.3d at 358. Federal law may preempt state law when federal statutory provisions or objectives would be frustrated by the application of state law. *Id.* Moreover, where Congress intends for federal law to govern an entire field, federal law preempts all state law in that field. *Id.* The Sixth Circuit has held that when a state law is not expressly preempted, courts must begin with the presumption that the law is valid. *Springston v. Consolidated Rail Corp.,* 130 F.3d 241, 244 (6th Cir. 1997). "'It will not be presumed that a federal statute was intended to supersede the exercise of power of the state unless there is a clear manifestation of intention to do so.

The exercise of federal supremacy is not lightly presumed.'" *Id.* (quoting *New York State Dep't of Soc. Servs. v. Dublino,* 413 U.S. 405, 415 (1973).

When Congress enacted the Telecommunications Act of 1996, it did not expressly preempt state regulation of interconnection. *Michigan Bell,* 323 F.3d at 358. In fact, it expressly preserved existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition. *Id.* *Specifically,* Section 251(d)(3) of the Act states that the Federal Communications Commission shall not preclude enforcement of state regulations that establish interconnection and are consistent with the Act. 47 U.S.C. § 251(d)(3).

The Act permits a great deal of state commission involvement in the new regime it sets up for the operation of local telecommunications markets, "as long as state commission regulations are consistent with the Act." *Michigan Bell Tel. Co.,* 323 F.3d at 359 (citing *Verizon North, Inc., v. Strand,* 309 F.3d 935 (6th Cir. 2002)). "Congress has made clear that the States are not ousted from playing a role in the development of competitive telecommunications markets...however, Congress did not intend to permit state regulations that conflicted with the 1996 Act...Thus, a state may not impose any requirement that is contrary to terms of sections 251 though 261 or that "stands as an obstacle to the accomplishment and execution of the full objectives of Congress." *Michigan Bell Tel. Co.*, 323 F.3d at 359 (quoting *In re Public Utility Commission of Texas*, 13 F.C.C.R. 3460, ¶ 52 (Oct. 1, 1997) (internal citations omitted). According to the FCC, as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted. *Id.* (citing *In re Public Utility Commission of Texas*, 13 F.C.C.R. 3460, ¶ 50-52). The Court finds that nothing in the state regulations stand as an obstacle to the accomplishment and execution of the full objectives of Congress.

The 1996 Act incorporated the concept of "cooperative federalism," whereby federal and state agencies "harmonize" their efforts and federal courts oversee this "partnership." *Michigan Bell*, 323 F.3d at 352. Quite clearly, the 1996 Act makes room for state regulations, orders and requirements of state commissions as long as they do not "substantially prevent" implementation of federal statutory requirements. The PSC's order, challenged here by BellSouth, embodies just such a requirement. 47 U.S.C. § 251(d)(3)(C). It establishes a relatively modest interconnection-related condition for a local exchange carrier so as to ameliorate a chilling effect on competition for local telecommunications regulated by the Commission. The PSC order does not substantially prevent implementation of federal statutory requirements and thus, it is the Court's determination that there is no federal preemption.

C. **Whether the PSC's decision is arbitrary and capricious.**

Aside from BellSouth's other arguments, the company alleges that the PSC's decision is arbitrary and capricious in that it is unsupported by substantial evidence in the record as a whole. BellSouth contends that the Commission lacked any support for its conclusion that BellSouth's policy of refusing to provide DSL service on CLEC UNE-P lines has a "chilling effect on competition."

The Kentucky PSC determined that it would consider "whether BellSouth acts reasonably in refusing to provide DSL service to competitive carrier UNE-P customers under, inter alia, 47 U.S.C. § 252 (e) [which preserves state law] and KRS § 278.280." July, 12, 2002 Order at 2. Kentucky law provides:

> Whenever the commission...finds that the rules, regulations, practices, equipment, appliances, facilities or service of any utility subject to its jurisdiction...are unjust [or] unreasonable,...the commission shall determine the just [or] reasonable...practices,...service or methods to be observed,...and shall fix the same by its order, rule or regulation.

KRS § 278.280(1). The PSC determined that BellSouth violated the above statute because its "practice of tying its DSL service to its own voice service to increase its already considerable market power in the voice market has a chilling effect on competition and limits the prerogative of Kentucky customers to choose their own telecommunications carriers." July 12, 2002 Order at 7.

By claiming that the PSC's findings lack any support in the record, BellSouth vastly understates the administrative record. Cinergy offered voluminous testimony describing BellSouth's anti-competitive practices and explaining how they would cripple Cinergy's ability to compete in the local voice market. For instance, prior to this arbitration, the PSC entered an advisory opinion stemming from a separate investigation of BellSouth's policies and found such policies to have a chilling effect on competition:

> BellSouth is aggressively offering customers bundled voice and advanced services while, according to AT&T, BellSouth consistently precludes CLECs who use the unbundled network element platform (UNE-P) from offering customers this same option. This has the effect of chilling local competition for advanced services.

Kentucky 271 Advisory Opinion, pp. 13-14. Cinergy also presented multiple witness to testify regarding BellSouth's policy's effect on competition.

The PSC's decision is supported by a reasoned explanation and is based upon the evidence in the record as a whole. Consequently, the Court sees nothing that points to the PSC's decision being arbitrary or capricious. Therefore, because the PSC's decision seems to be the result of a deliberate principled reasoning process, and is supported by substantial evidence, the Court finds that the decision of the state commission should stand.

Accordingly,

IT IS ORDERED, that the PSC's decision be, and the same hereby is, **AFFIRMED**.

This the 29th day of December, 2003.

Signed By:
Joseph M. Hood JMH
United States District Judge

NOTICE IS HEREBY GIVEN OF THE ENTRY OF THIS ORDER OR JUDGMENT
ON 12-29-03
LESLIE G. WHITMER, CLERK
BY: Shirley Middleton, D.C.

3:03-cv-23 Notice will not be electronically mailed to:

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LOUISIANA PUBLIC SERVICE COMMISSION

ORDER R-26173

Docket R- 26173, Louisiana Public Service Commission, ex parte. In re: BellSouth's provision of ADSL Service to end-users over CLEC loops- Pursuant to the Commission's directive in Order U-22252-E

(Decided at the December 18, 2002 Business and Executive Session.)

I. <u>BACKGROUND</u>

The Louisiana Public Service Commission Staff ("Staff") filed its Final Recommendation in Docket Number U-22252-E, *In re BellSouth's Section 271 Pre-application*, on August 31, 2001 Among the numerous issues addressed therein was a discussion of MCI WorldCom Communications, Inc 's ("WorldCom") contentions regarding BellSouth Telecommunication's, Inc ("BellSouth") practices in line splitting arrangements.[1] Staff described its understanding of the policy as follows: "BellSouth will not provide a customer with its retail DSL service unless that customer also purchases its voice service from BellSouth."[2] After discussing the matter in greater detail, Staff ultimately recommended the following

> That the Commission order BellSouth to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice service under the same terms and conditions that BellSouth offers the high frequency portion of its loops in line sharing arrangements Staff further recommends that the CLEC shall be prevented from charging BellSouth for use of its UNE loop Any issues regarding implementation of this recommendation shall be referred to the regional line sharing/line splitting collaborative for review and resolution. BellSouth may petition the Commission for a stay of this requirement upon presentation of evidence regarding substantial operational issues that must be resolved [3]

Staff's Final Recommendation, in docket U-22252, Subdocket E, was considered by the Louisiana Public Service Commission ("LPSC", "Commission") at its September 19, 2001 Business and Executive Session At that Session, Commissioner Blossman moved to adopt Staff's Final Recommendation, with a few modifications, one of which directly addressed the above quoted section The motion directed Staff to further study the issue of whether BellSouth should be required to provide its ADSL service to end users over

[1] Staff's Final Recommendation, Docket U-22252-E, pages 86-87
[2] Id at 86
[3] Id at 113

EXHIBIT
B

the high frequency portion of the same loop being used by a CLEC to provide voice services. The motion was unanimously adopted by the Commission and memorialized in Order U-22252-E, issued September 21, 2001.

In compliance with the Commission's directive, Staff opened and published the following *in the Commission's Official Bulletin dated* December 7, 2001 Docket R-26173,

> Pursuant to the Commission's directive in Order U-22252-E, Staff was to further study the issue of whether BellSouth Telecommunications, Inc should be required to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice services.

Parties were given 25 days to intervene and/or file comments in the docket. Interventions and/or initial comments were received from the following parties: ITC^DeltaCom Communications, Inc d/b/a ITC^DeltaCom ("DeltaCom"), Xspedius Corporation ("Xspedius"), Cox Louisiana Telecom, L.L C., d/b/a Cox Communications ("Cox"), NewSouth Communications Corporation ("NewSouth"), Access Integrated Networks, Inc ("Access"), BellSouth, KMC Telecom, Inc. ("KMC") and the Southeastern Competitive Carriers Association ("SECCA")

Following the receipt of initial comments, Staff received both formal and informal requests from the interveners to file additional/reply comments. By notice dated May 9, 2002, Staff granted the parties the opportunity to file additional comments by May 24, 2002. *The following parties provided additional/reply comments:* BellSouth, KMC, SECCA and WorldCom Access, DeltaCom, NewSouth and Xspedius jointly filed reply comments

After thoroughly reviewing all initial and reply comments, Staff issued a Proposed Recommendation on July 10, 2002. In order to clarify the opportunity for exceptions and replies to the recommendation, a Procedural Schedule and Order was issued on July 25, 2002. Exceptions were received only from BellSouth. Reply comments were received from KMC, WorldCom and SECCA and jointly from DeltaCom, Access, NewSouth and Xspedius Additionally, an informal technical conference was held on September 3, 2002, with representatives from all of the above parties present. In connection with its review, Staff prepared a detailed summary of all initial and reply comments which was included in the Proposed Recommendation issued

July 10, 2002. A short summary of the exceptions and replies to the Proposed Recommendation are included herein

II. JURISDICTION

The powers and duties of the Louisiana Public Service Commission are contained in Article IV § 21 of the Louisiana Constitution of 1974. As stated therein, the Commission has the authority to

> "regulate all common carriers and public utilities and has all other regulatory authority as provided by law. The Commission shall adopt and enforce reasonable rules, regulations and procedures which are necessary for the discharge of its duties including other powers and duties as provided by law."

Pursuant to its constitutional authority, the Commission adopted the Regulations for Competition in the Local Telecommunications Market ("Local Competition Regulations", "Regulations")[4], as most recently amended by the April 5, 2000 General Order ("General Order") As stated in the Preamble to the Regulations,

> Through the development of effective competition, which promotes the accessibility of new and innovative services at non-discriminatory prices consumers can and are willing to pay, and which results in wider deployment of existing services at competitive prices, the public interest will be promoted.

Section 201. A of the Local Competition Regulations describes the public policy as follows

> (T)he Louisiana Public Service Commission hereby finds, determines and declares that the promotion of competition in all local telecommunications markets in Louisiana is in the public interest.

In furtherance of the above stated goal to promote competition in all local telecommunications markets in Louisiana, this Commission has initiated a number of rule-making proceedings One such proceeding, Docket U-22252-C *In re BellSouth Telecommunications, Inc Service Quality Measurements*, established performance measurements to monitor the service BellSouth provides to its competitors. No less than four orders have been issued in that docket, all of which have fostered the Commission's goals of promoting competition Further, Docket U-24714, Subdocket A, *In re Final Deaveraging of BellSouth Telecommunications, Inc , UNE Rates,* established new cost

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[4] The actual Regulations are contained in "Appendix B" to the General Order

based rates for UNEs available to CLECs Staff notes that following the issuance of the Order in that docket, many new competitors have entered the market Additionally, in connection with Staff's review of BellSouth's 271 pre-application filing in Docket U-22252-E, several recommendations were made to further promote competition

III. SUMMARY OF STAFF'S PROPOSED RECOMMENDATION

In Docket U-22252-E, Staff made the following recommendation.

> That the Commission order BellSouth to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice service under the same terms and conditions that BellSouth offers the high frequency portion of its loops in line sharing arrangements. Staff further recommends that the CLEC shall be prevented from charging BellSouth for use of its UNE loop Any issues regarding implementation of this recommendation shall be referred to the regional line sharing/line splitting collaborative for review and resolution BellSouth may petition the Commission for a stay of this requirement upon presentation of evidence regarding substantial operational issues that must be resolved

When the matter was considered at the Commission's September 2001 Business and Executive Session, the Commission voted to accept Staff's Recommendation, with Staff directed to determine whether ADSL service could be added to UNE lines in the future [5] Order U-22252, E memorialized the Commission's vote, instructing Staff to,

> further study the issue of requiring BellSouth to provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice service until such time as the operational and policy issues associated therewith are fully explored [6]

Based on the above, a presumption existed that Staff's Recommendation in Docket U-22252, E should be adopted, absent any "operational or policy issues" prohibiting its implementation. Comments received from the parties suggested additional concerns must also be addressed, as evidenced by comments received relative to possible jurisdictional and technical issues Neither the vote of the Commission, nor the directive of the order, suggested any such issues were a concern prior to this docket being opened. Nonetheless, to insure all issues are thoroughly explored, Staff's Proposed Recommendation addressed not only "operational and policy" issues, but jurisdictional

[5] See Official Transcripts of the September 21, 2001 Business and Executive Session

[6] Order U-22252, E

and technical issues as well Based on the following conclusions, it was Staff's opinion that the recommendation set forth in docket U-22252-E be reaffirmed and adopted.

A. Policy Issues

Before addressing any "policy" arguments made by the parties, Staff reminded that parties that this Commission's policy, as stated in the Local Competition rules, is to promote competition in all telecommunications markets. Adopting Staff's Recommendation in U-22252, subdocket E will promote that goal, by allowing more end-users to choose an alternative voice provider without fear of losing their DSL service. BellSouth's policy of refusing to provide its DSL service over CLEC voice loops is clearly at odds with the Commission's policy to encourage competition Likewise, BellSouth's contention that such a regulation would diminish competition in the DSL market is not consistent with the comments received.

Pursuant to its current DSL policy, BellSouth "simply chooses not to sell DSL service that work on CLEC loops."[7] As summarized in KMC's comments, BellSouth's policy actually deters customers from switching to other providers, thus hindering competition not only in the voice market, but the DSL market as well Various other examples of the anti-competitive effects of this policy were contained in the CLEC's comments[8], including (1) disconnection of BellSouth DSL service when an end-user changes voice providers, (2) placing codes on Customer Service Records ("CSRs") that must be removed before transferring service, (3) placing DSL service on primary lines in multi-line situations without explaining the consequences to the end-user and (4) transferring back voice service if BellSouth's DSL is subsequently placed on the primary line. Interestingly enough, the only of the above examples BellSouth addressed in its reply comments is the primary line issue, referring Staff to the FCC's 271 order BellSouth's failure to even dismiss or deny the other examples caused Staff grave concern, as any of the above puts a voice CLEC in a clear competitive disadvantage by creating more "hoops" a CLEC must jump through to provide voice service, as outlined in Staff's summary of the individual comments

[7] See reply affidavit of Thomas G Williams filed June 25, 2001 in Docket U-22252-E at page 11
[8] A detailed summary of the initial comments filed by all parties is contained in Staff's Proposed Recommendation issued in this docket on July 10, 2002

Rather than discuss the above concerns, BellSouth argued the Commission should make inquiries relative to the investments, personnel and taxes CLECs have made in Louisiana before it makes a decision. Staff was at a loss as to how any of this information, if obtained, would be of any benefit to the Commission or Staff. In furtherance of this position, BellSouth filed a Motion for Leave to Propound Data Requests on June 28, 2002 Staff was concerned this filing could not only result in an unnecessary delay in the issuance of Staff's Recommendation, but also could broaden the scope of the docket beyond the Commission's directive

In conclusion, the Commission's policy is to support competition in all telecommunications markets, including local voice service. The anti-competitive affects of BellSouth's policy are at odds with the Commission's, and thus should be prohibited

B. Jurisdictional Issues

While "jurisdictional issues" were not contemplated in the Commission's directive, Staff believed it was important to address this Commission's jurisdiction and how it is consistent with that of the FCC BellSouth's argued the LPSC has no jurisdiction to regulate the provisioning of its DSL service over CLEC voice loops. This argument is couched on the presumption that Staff's recommendation would essentially amount to LPSC regulation of DSL, which is a federally tariffed service. This argument fails to consider the basis of Staff's Recommendation in U-22252-E, i.e the anticompetitive effect BellSouth's practice has on CLEC **voice** customers in violation of relevant LPSC, as well as FCC, rules and regulations, by restraining voice competition. Despite BellSouth's arguments to the contrary, Staff's Recommendation in docket U-22252-E is entirely consistent with the Telecommunications Act, the Line Sharing Order and Line Sharing Remand Order

The prevailing theme of the Local Competition Regulations is the Commission's goal of promoting competition in the local telecommunications market. Conversely, any practice that has a detrimental effect on competition is inconsistent and should be rectified Further, Section 701 of the Local Competition Regulations, which established BellSouth's Consumer Price Protection Plan, provides in Section 701 G. 10, "Tying arrangements are prohibited."[9] Staff concluded that not only is BellSouth's current practice regarding the provisioning of its DSL service anti-competitive, it is also a "tying arrangement." Simply put, BellSouth, as the dominant voice and DSL provider in Louisiana, is tying the provision of its DSL service to its voice service. Only end-users who receive voice service from BellSouth, or end-users of a CLEC reselling BellSouth's voice service, may receive BellSouth DSL.

Claims that various RBOCs are behaving in an anti-competitive matter concerning the provision of their DSL services to voice service are not new. In support of their policy, RBOCs have continuously argued the provision of DSL is federally regulated and as such cannot be addressed by state commissions. WorldCom's first raised this issue in Louisiana in its reply comments filed in Docket U-22252-E.[10] To Staff's knowledge, the RBOC argument has never been successful, as each state commission addressing DSL related issues has done so based on its authority to promote voice competition and address anti-competitive behavior.[11]

In addition to orders cited by the CLECs, the Michigan Public Service Commission, in an order issued in Case No. U-13193 on June 6, 2002 ("Michigan Order"), determined that Ameritech's practices concerning the provisioning of its DSL services were anti-competitive and therefore violated state law.[12] As was the case in the Florida Order, the Michigan Commission addressed issues identical to those being considered in this docket. Staff's Recommendation in U-22252-E, and its recommendation herein, are consistent with both orders.

BellSouth's was correct in saying the FCC's Line Sharing Order did not create an obligation that ILECs continue to provide DSL service when they are no longer the voice provider.[13] However, neither the Line Sharing Order, nor the Line Sharing Remand Order prohibited states from regulating anti-competitive behavior or illegal tying arrangements. In fact, the FCC specifically stated in the Line Sharing Remand Order,

> To the extent that AT&T believes that specific incumbent behavior constrains competition in a manner inconsistent with the

[9] A similar provision applying to all certificated TSPs is contained in Section 301.J.2 of the Local Competition Regulations.

[10] Staff's recommendation in U-22252-E was based on its consideration of those initial comments, as well as BellSouth's subsequent reply.

[11] See California Order at pages 6-11, Florida Order at pages 7-9.

[12] See Michigan Order at page 15.

[13] As a reminder, the DC Circuit has vacated the Line Sharing Order.

> Commission's line sharing rules and/or the Act itself, we encourage AT&T to pursue enforcement action

Clearly the above pronouncement grants this Commission authority to rule on the issue before it without infringing on the FCC's jurisdiction, as the LPSC is acting in furtherance of its goal (and the FCC's) to promote competition, not attempting to regulate DSL service.

Staff concluded that any perceived conflicts between FCC and LPSC jurisdiction raised by BellSouth should be of no concern to this Commission, as it clearly has the authority to determine BellSouth's practices are contrary to LPSC rules and regulations, without fear of infringing on the FCC's jurisdiction or non-regulated areas.

C. Technical Issues

Staff's discussion of technical issues will be brief Simply put, there is no technical reason set forth by BellSouth or the CLECs as to why BellSouth's DSL service cannot be provisioned over CLEC voice loops As mentioned throughout this recommendation, BellSouth's current practice is based on an internal policy decision.

D. Operational Issues

As set forth in Staff's Recommendation in docket U-22252-E, BellSouth's obligation to provide its DSL service over CLEC voice loops could be stayed if BellSouth provided evidence of "substantial operational issues" that must be resolved. Essentially this docket gives the parties the opportunity to review any such operational issues prior to any Commission Order being issued

As summarized herein, all operational issues addressed by BellSouth in its comments involve additional costs it believes it would incur if it loses control of the local loop, but is still required to provide its DSL service In response to these operational issues, Staff first notes that in U-22252-E, Staff recommended that CLECs not be allowed to charge BellSouth for use of its UNE loops Despite the fact that SECCA has suggested otherwise, Staff had no intention of modifying that portion of the recommendation Therefore, any concerns relative to costs assessed to BellSouth for using the CLEC loop are moot

Interestingly enough, the remainder of operational issues raised by BellSouth are arguably the same operational issues that exist for competitive DSL providers that do not control the voice portion of the loop. Any DLEC or CLEC providing DSL services only (i e , one that is not also the voice provider) is in the same position However, BellSouth argued such an arrangement causes operational issues that would drive up the costs of its DSL. As an alternative, BellSouth proposed CLECs convert UNE loops of BellSouth DSL customers to resale, thereby allowing BellSouth to continue controlling the loop As evidenced by the comments, not only was such a suggestion infeasible to some CLECs, it would only increase the costs and operational issues associated with providing voice service. Staff was not convinced that any of the operational issues provided by BellSouth were substantial enough to warrant it being absolved of providing its DSL service to CLEC voice customers If anything, they suggested to Staff that BellSouth is leveraging position as the dominant voice provider with control of the network, to give itself another advantage over CLEC DSL providers

Accordingly, Staff reemphasized its U-22252-E recommendation to make it clear that BellSouth should not only be required to provision its DSL service to end-users over CLEC voice loops, but must do so utilizing the same non-discriminatory rates, terms and conditions it provides such services to its voice customers, as BellSouth's comments suggest it may simply raise the price of DSL to CLEC voice customers in such a fashion that Staff's Recommendation is rendered moot

IV. SUMMARY OF BELLSOUTH'S EXCEPTIONS TO STAFF'S PROPOSED RECOMMENDATION

BellSouth's exceptions to Staff's Proposed Recommendation were filed on August 12, 2002, along with three affidavits As set forth in the filing, BellSouth took exception with Staff's Recommendation in six specific areas, arguing 1 The Commission's Rules of Practice and Procedure do not authorize Staff to proceed in the manner it did in this docket; 2. The Commission does not have jurisdiction to alter or otherwise regulate BellSouth's Interstate Services, 3. Staff's Presumption that the Commission has prejudged this matter is wholly inappropriate, 4 CLEC Profit Margin, not customer choice is the core issue, 5. Operational issues exist and 6. KMC's

Complaints referred to by Staff are unfounded Rather than provide an exhaustive summary of these comments, Staff responded to the exceptions in its Final Recommendation.

V. <u>CLEC REPLY COMMENTS</u>

As mentioned infra, reply comments to BellSouth's Exceptions were received from WorldCom, SECCA, KMC, Access, DeltaCom, Xspedius and NewSouth These reply comments addressed BellSouth's exceptions, provided support for the adoption of Staff's Proposed Recommendation, and included affidavits and other exhibits as attachments No exceptions to Staff's Proposed Recommendation were received from the CLECs Similarly as with BellSouth's comments, rather than providing an exhaustive summary of the reply comments, Staff addressed the comments in its Final Recommendation

VI. <u>INFORMAL TECHNICAL CONFERENCE</u>

Following receipt of BellSouth's exceptions and the replies thereto, Staff presided over an informal technical conference Representatives of BellSouth, several CLECs, as well as Commissioners Blossman and Sittig and Commission Staff, were present at the technical conference The parties were given an opportunity to respond to the latest filings, ask and field questions and provide further support for their respective positions. Particularly, BellSouth witness Ruscilli went into detail explaining why he concluded in his affidavit that resale is a valid option for the CLECs and BellSouth witness Milner explained his affidavit relative to Operational Issues. Following BellSouth's presentations, CLEC witnesses were given the opportunity to respond and/or ask questions of the witnesses Questions were also posed by the Commissioners and Staff. Specifically questions were asked as to who would invest in order to ensure the entire state has DSL available No affirmative response to deploy was received from the CLECs. In addition to the exceptions and replies, Staff considered this information in support of its recommendation.

VII. STAFF'S FINAL RECOMMENDATION

As stated herein, Staff's role in this docket was to determine whether any policy or operational issues existed that would prohibit BellSouth from providing its ADSL service over CLEC loops. That is precisely what Staff considered in detail in its Proposed Recommendation, with Staff ultimately concluding that no such operational or policy issues existed. As no exceptions were provided by the CLECs, Staff's Final Recommendation focused on BellSouth's Exceptions and any impact they had on Staff's Proposed Recommendation

A. Staff's Reply to Exceptions 1 and 3.

Interestingly, BellSouth began its exceptions not by questioning Staff's Proposed Recommendation, but by questioning the rulemaking procedure employed BellSouth concluded the procedure violated not only the Commission's Rules of Practice and Procedure, but also Article IV § 21 of the Louisiana Constitution. BellSouth suggested as a remedy the Commission opening up a docket to establish concrete rules for such proceedings. A simple review of recent Commission history would question the correctness of this assumption. Staff, through the undersigned counsel, has been either counsel of record or co-counsel of record in numerous Commission rulemaking proceedings (and all of which included BellSouth as a party) in which essentially the same procedural rules were followed, without objection from BellSouth or others.[14]

Further troubling was BellSouth's statement that it was under the impression "Staff would consider the issues presented in this docket in a full and comprehensive manner as the 271 Order requires "[15] Staff assumed BellSouth's was suggesting Staff's consideration of rounds of comments and exhibits received by the parties, numerous informal meetings addressing the issues, review of relevant FCC, LPSC and other PSC decisions, the result of which was a 24 page recommendation, was insufficient The presumption referred to by Staff, to which BellSouth takes exception, did not in any way diminish the amount of consideration, time and effort that went into Staff's

[14] U-23445, U-23446, U-24050, U-25754, R-26171 and R-26438 were all Rulemaking dockets involving Telecommunications issues In most instances, fewer comments were received than allowed in this proceeding Further, BellSouth did not question the procedure followed herein until after Staff's Recommendation, which took a contrary position, was issued

[15] BellSouth's Exceptions to Staff's Proposed Recommendation at page 5

Recommendation. It was only after consideration of all information contained in this record that Staff issued its Proposed Recommendation. Nonetheless, any attempts to suggest the Procedure followed herein by Staff were inconsistent with the Commission's Rules and Regulations should be simply dismissed as an effort to create additional issues the Commission must consider

B. Staff's Reply to Exception 2.

BellSouth also raised many of the same jurisdictional issues contained in its original comments in its exceptions. BellSouth suggested the effect of Staff's recommendation would be the imposition of disincentive to the deployment of DSL service, rather than the goal of promoting the accessibility of new and innovative services. Such a statement creates a slippery slope for Staff (and BellSouth) to tread upon How can the Commission promote the deployment of a service over which BellSouth argues it has no jurisdiction over? Should Staff assume it is ok for the Commission to establish rules relative to interstate services, provided they only benefit the provider of such services?

By no means was Staff suggesting this recommendation would amount to a regulation of DSL services, however, it is interesting that BellSouth would have the Commission believe the Recommendation would hinder the further deployment of such services According to BellSouth's experts, approximately 70-75% of BellSouth customers in Louisiana have access to its DSL, while only 5% or so subscribe to it Staff argued if any disincentive exists prohibiting BellSouth from further deploying its services, it was the demand for the product, not any order of this Commission. Staff's Recommendation, if adopted, would only require BellSouth to continue providing its DSL service to customers currently receiving the service when they switch voice providers, and to voice customers of CLECs opting to receive the service, essentially meaning BellSouth will derive more revenue for its non-regulated service, in addition to furthering competition in the voice market.

BellSouth also objected to Staff's classification that BellSouth is "tying" its DSL service to its voice service, suggesting Staff has transformed this proceeding into an enforcement action. BellSouth's suggestion disregards the fact that Staff had recommended no penalties, fines or other administrative remedies be levied against BellSouth, only that it (BellSouth) rectify any potential anti-competitive behavior. Staff agreed with SECCA that this Commission has the jurisdiction to rectify any potentially anti-competitive behavior without the necessity of instituting an enforcement action.

C. Staff's Reply to Exception 4.

In this exception, BellSouth provided arguments and testimony in support of its position that resale is a valid option for the CLECs, further arguing CLECs simply choose not to use it for cost reasons While Staff appreciated BellSouth's comments relative to CLEC profit margins and the work done by Mr. Ruscilli relative to the costs associated with UNE-P versus resale, it respectfully disagreed with the conclusion. UNE-P has been recognized by this Commission as a valid form of competition, most recently in BellSouth's 271 application As long as it is treated as such, CLECs should have the choice to determine how they choose to compete, rather than the choice being made by their competition Not only does BellSouth's "Resale Option" restrict the mode of entry a CLEC can use, it also restricts the service offering that can be made to those services contained in BellSouth's tariffs. For example, a CLEC such as WorldCom could not offer its "Neighborhood" plan via resale because BellSouth provides no similarly bundled service it can resell

D. Staff's Reply to Exception 5.

Despite what is suggested by the CLECs in their reply comments, Staff never determined there were no operational issues that may be incurred by BellSouth. Staff simply concluded that none of the issues were substantial enough to warrant BellSouth being absolved from following Staff's Proposed Recommendation BellSouth's exceptions and affidavits shed further light on the potential operational issues it believes it will encounter if forced to implement Staff's Recommendation. While BellSouth qualified these operational issues as being burdensome, Staff believed the actual effect of the operational changes must specifically be determined before they absolve BellSouth from implementing Staff's Recommendation For example, at least two of the operational issues raised by Mr. Milner in his affidavit were rendered moot by Staff's

Proposed Recommendation wherein Staff concluded that CLECs should be prevented from charging BellSouth for use of the high frequency portion of the loop. While there is some overlap, the majority of the remaining operational issues would only apply when BellSouth is required to provide its DSL over CLEC voice loops, not UNE-P. Nonetheless, based on the above, Staff was willing to clarify its recommendation to the extent that the operational issues related specifically to UNE loops (facilities based providers) are later determined to be overly burdensome If such a determination were made, Staff would recommend that BellSouth be required to provide its DSL service only to CLEC customers via UNE-P, provided that BellSouth shall not prematurely disconnect voice and data service to a customer converting service from BellSouth to a facility based CLEC Should a premature disconnection occur, BellSouth shall be fined up to $10,000.00 per occurrence, as well as provide a full refund to the customer for the previous month's voice and data service Additionally, Staff noted that due to the regional nature of BellSouth's Operational Support Systems, any final decision of a Commission in the BellSouth region on this issue would require BellSouth to make the necessary operational changes, thereby re-instituting Staff's original recommendation.

E. Staff's Reply to Exception 6.

Finally, BellSouth suggests that Staff wrongfully relied on KMC's allegations, suggesting KMC has a history of make allegations without any factual support Such a suggestion is obviously refuted by the information provided to Staff counsel by KMC in Docket U-22252-E and the series of Collaborative workshops, which were referenced in support of the finding Copies of those filings are contained herein.

VIII <u>CONCLUSION AND COMMISSION CONSIDERATION</u>

For the reasons stated above, Staff recommended that its recommendation, as contained in docket U-22252-E, and as modified in this docket, be adopted The matter was considered at the Commission's December 18,2002 Business and Executive Session. Following oral argument, Commissioner Field moved to accept Staff's Final Recommendation, adding the following provision: "The Louisiana Public Service Commission affirms that it does not regulate the rates or pricing of BellSouth's wholesale or retail DSL service" Following a second by Commissioner Sittig, Commissioner Blossman read a letter from Congressman Billy Tauzin into the record. Roll was taken, with Commissioners Field, Sittig and Dixon voting yes, Commissioner Blossman voting no and Commissioner Owen absent.

IT IS THEREFORE ORDERED THAT

1 Staff's Final Recommendation, for the reasons set forth herein, is adopted

2 The Commission affirms that it does not regulate the rates or pricing of BellSouth's wholesale or retail DSL service

3 This Order shall be effective immediately

BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA
January 24, 2003

/S/ JACK "JAY" A. BLOSSMAN
DISTRICT I
CHAIRMAN JACK "JAY" A. BLOSSMAN

/S/ ABSENT
DISTRICT V
VICE-CHAIRMAN DON OWEN

/S/ IRMA MUSE DIXON
DISTRICT III
COMMISSIONER IRMA MUSE DIXON

/S/ C. DALE SITTIG
DISTRICT IV
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LAWRENCE C. ST. BLANC
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